United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7502

In The

United States Court of Appeals

For The Second Circuit

ANDY DINKO individuall[illegible] nd on behalf of the members of the National Maritime Un[illegible] of America,

Plaintiff-Appellant,

vs.

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime Union of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officer's Pension Plan and individually, and the AMALGAMATED BANK OF NEW YORK, as Successor T[illegible]istee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANDY DINKO individually and on behalf of the members of the National Maritime Union of America,

Plaintiff-Appellant,

-against-

75 Civ. 524

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and the AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Martime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants-Appellees.

- -

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did plaintiff's demand of December 17th satisfy the procedural prerequisite for suit under 29 U.S.C. Section 501(b)?

B. Was the implicit, natural and true meaning of plaintiff's request to demand court action by the defendants?

C. Did plaintiff make an adequate showing of "good cause" on the face of his verified applications, affidavit in support thereof with attached exhibits, and the complaint?

D. Should the order granting leave to commence this action upon a finding of "good cause" shown, have been vacated without a hearing or a trial of the allegations?

STATEMENT OF THE CASE

The plaintiff-appellant Andy Dinko brought this action individually and on behalf of the members of the National Maritime Union of America (hereinafter referred to as "the NMU"), under the Labor-Management Reporting and Disclosure Act, (hereinafter referred to as "the LMRDA"), Title 29, United States Code, Section 501. The complaint alleges that the defendants-appellees Wall, Curran, Barisic, Bocker, Martin, Miller and Rich have violated their fidu-

ciary and statutory duties within the meaning and intent of the LMRDA by, inter alia, misappropriating union funds, refusing to make certain financial, membership and NMU pension plan data available to plaintiff and other NMU members in good standing, and manipulating the revision and adoption of NMU officers' and staff pension plans.

Defendants moved for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), dismissing the complaint on the ground that the Court lacked jurisdiction over the subject matter of the action. On August 13, 1975, judgment was entered dismissing the complaint on the order of the Court below, which vacated the prior order granting leave to commence the action and granted defendants' motion.

On December 17, 1974, plaintiff wrote defendants Barisic and Wall demanding that the defendants declare void a vote taken on a recent proposed revision of an NMU officers' pension plan. Plaintiff detailed the basis for his demand, and claimed that such vote was conducted in violation of the NMU Constitution and the Landrum Griffin Act. Further, plaintiff demanded an accounting of all NMU expenditures in connection with this officers' pension plan and of the benefits paid NMU officers and staff there-

under. He further demanded an independent audit of all NMU expenditures, the establishment of a "Membership Watch Dog Committee" to protect the membership from the "continuous misappropriation" of union funds, and the halt to further expenditure of union funds for payment of benefits under these officer and staff pension plans. Suit was urged and then threatened if the NMU governing board or officers ignored plaintiff's requests and demands.

Following the defendants' failure to bring suit to recover damages, or to secure an accounting or take any other appropriate relief as demanded, plaintiff moved ex parte and pursuant to Section 501(b) of the LMRDA upon verified application for leave of the Court to sue the defendants in the United States District Court for the Southern District of New York. By order of Judge Marvin E. Frankel, dated January 27, 1975, plaintiff was granted leave to commence this proceeding; the Court having found that plaintiff served demand on the appropriate officers of the NMU demanding action on behalf of the NMU to secure an accounting, recover damages and other appropriate relief, that no action had been taken as a result of plaintiff's demand within a reasonable period of time and that "good

cause" had been shown. Plaintiff's verified application was supported by his affidavit, with annexed exhibits.

With the commencement of this action by the filing and service of a complaint, defendants answered, generally denying plaintiff's allegations. Thereafter defendants began pre-trial discovery by noticing and taking plaintiff's deposition over two sessions, the first on April 15, 1975. Then, on April 21, 1975, the day before the second session, plaintiff was assaulted and beaten while distributing leaflets in the NMU Hall. The following day, while under sedation prescribed by his personal physician, plaintiff completed his deposition.

On April 29, 1975, defendants continued their pre-trial discovery by serving written interrogatories on plaintiff pursuant to Fed. R. Civ. P. 33.

By notice of motion dated May 7, 1975, plaintiff moved for an order disqualifying defendant Abraham E. Freedman as attorney for the defendants Wall, Curran, Barisic, Bocker, Martin, Miller, Rich and Freedman, and enjoining the expenditure of NMU funds for the defense of these defendants. By notice of motion dated May 28, 1975, defendants cross-moved for an order, pursuant to Rule 12(b)(1) of the Fed.

R. Civ. P., dismissing the complaint for lack of subject matter jurisdiction of the action. The grant of the defendants' motion by Judge Henry F. Werker, without prejudice to the plaintiff, is the subject matter of the instant appeal.

The memorandum decision of the Court below, dated August 4, 1975, found that plaintiff had failed to comply with the request requirement prerequisites to suit under Section 501(b) for the following reasons. Firstly, the Court found that plaintiff's letter of December 17th, directed to the officers of the NMU, although intended to bring about action by them, did not request that the officers of the NMU initiate court action to achieve plaintiff's demands. The Court held that under Section 501(b) "a demand must be made by the plaintiff requesting that the union or its governing board or officers take court action to secure the relief" contemplated therein. Therefore, Judge Werker held, plaintiff's demand was an inadequate or insufficient "request requirement." Secondly, the Court found that from reading the plaintiff's deposition, the affidavit of Stanley B. Gruber in support of the Rule 12(b) motion to dismiss and the exhibits annexed to the defendants' motion papers,

an adequate showing of "good cause" had not in fact been made by the plaintiff as required by Section 501(b), and that the ex parte order of Judge Frankel, made upon the submission of a verified application, with exhibits annexed thereto, and plaintiff's affidavit, should accordingly be vacated.

ARGUMENT

POINT I

PLAINTIFF'S REQUESTS AND DEMANDS PUT TO THE OFFICERS OF THE NMU, AS EMBODIED IN HIS DECEMBER 17th LETTER, FULLY COMPLIED WITH AND SATISFIED THE REQUIREMENTS OF SECTION 501(b) FOR SUIT UNDER THE LMRDA.

Plaintiff's letter of December 17th did in fact and substance, and under any reasonable construction of the language employed by a seaman without formal education who has known the hyperbole of Union Halls as a member in good standing of the NMU for more than 30 years, satisfy the request requirement of section 501(b). Plaintiff repeatedly demanded an accounting and other appropriate relief in order to recover damages for the benefit of the labor organization that he alleged was being adversely effected by the actions of the defendants. He insisted that no further union funds be expended for the officers' pension plan. He alleged that such expenditures were illegal, and warned defendants that they would be held personally liable to the union for the repayment of these funds. Then, he twice made reference to court proceed-

ings (a prior suit against NMU officials, and one he would commence) in an effort to move defendants to court action on his requests.

This Court, in Cassidy v. Horan, 405 F.2d 230 (2d Cir. 1968), reaffirmed its holding in Coleman v. Brotherhood of Ry. & S.S. Clerks, etc., 340 F.2d 206 (2d Cir. 1965), that an actual request for relief under Section 501(b) was mandatory, and that an allegation of the futility of such a request would not suffice. See Horner v. Ferron, 362 F.2d 224 (9th Cir.), cert. denied, 385 U.S. 958 (1966). The majority of the Court in Cassidy, however, found that plaintiff's demand by letter for return to the union of sums of money which he alleged had been received from the union and spent against the interests of the union, was insufficient. In the instant suit, plaintiff went clearly beyond a mere request that certain action of the defendants be halted and/or declared void. He expressly and repeatedly demanded the securement of an accounting. Yet more telling, he made reference to judicial precedent in Morrissey, et al. v. Curran, Wail, Perry, et al., 69 Civ. 442 (S.D.N.Y. 1972) to support his

demand, and as a basis therefor.

The form of the request required by Section 501(b) should not be reduced to a search for any particular words. Instead, as urged by Chief Judge Lumbard in his concurring and dissenting opinion in Cassidy, supra at 233, the obvious, implicit meaning of the request should be looked to rather than requiring any particular unnecessary, yet critically talismanic word(s). The courts, bearing in mind that the procedural requirements of Section 501(b) are often satisfied by laymen, without the advice or assistance of counsel, should look, as Chief Judge Lumbard urged, to the unreserved and absolute meaning of the request. This should be deemed sufficient, and is akin to the demand required in corporation law before a derivature suit by shareholders will lie, and to the rule of exhaustion of administrative remedies before resort to the courts is sought. See Aho v. Bintz, 290 F. Supp. 577, 580 (D. Minn. 1968).

Coleman v. Brotherhood of Ry. & S.S. Clerks, etc., supra, is not to the contrary, since there was no request whatsoever therein. The Court held only that an actual

request for action was mandatory to protect union officials from unjust harassment, and that an allegation of futility of such a request would not suffice.

The danger that "in particular applications, literalness may tend to stifle true legislative intent," and the admonition that the statutory language "must be given its natural meaning" was eloquently raised in International Bhd. of Teamsters, etc. v. Hoffa, 242 F. Supp. 246, 249 (D.D.C. 1965). Consonant therewith, if from the natural, implicit language of plaintiff's December 17th letter a request that the union take court action for an accounting or other appropriate relief can be made out from the four corners of the document, then the failure to explicitly employ the technical word(s) should not be determinative. See also Persico v. Daley, 239 F. Supp. 629 (S.D.N.Y. 1965).

A recent opinion in Sabolsky v. Budzanoski, 457 F.2d 1245, 1252 (3d Cir.), cert. denied, 409 U.S. 853 (1972) points to this effort to look for substance over form. Therein, the Court noted the sincere efforts made by plaintiffs to obtain compliance with their requests. The let-

ter of request the Court noted, "although not a request of the officer to sue, did seek internal relief, and in the circumstances then existing . . . cannot be deemed insufficient." Compare Calagaz v. Calhoon, 308 F.2d 248 (5th Cir. 1962). In this same vein, the Court in Wimbush v. Curran, 356 F. Supp. 316 (S.D.N.Y. 1973), relying in part on the wisdom of Chief Judge Lumbard's dissent in Cassidy, supra, construed the following statement:

> "immediate remedial action is demanded in default of which suit may be instituted against you"

as the equivalent of a demand to sue. Judge Carter held:

> "Inasmuch as the demand requirement as interpreted in this circuit is exceedingly technical, it seems inappropriate to increase the burden upon prospective litigants by barring the use of language which includes, albeit nonexclusively, the concept 'sue'." Wimbush, supra at 319.

While the condition precedent that the request requirement include court action is the law in this circuit, recent opinions have taken a more flexible view in requiring that such request be at least implicit in the demand. Such a request was clearly contained in the natural meaning and intent of plaintiff's December 17th letter.

plication for leave to sue, and alleged facts are set forth which would provide "good cause" for litigation in behalf of union membership, the courts have uniformly deemed:

> "it appropriate to grant the applicants access to [a] court and to permit consideration of the adequacy of particular causes of action at the appropriate stage of the contemplated proceeding." Wimbush v. Curran, supra at 318; see also, Addison v. Grand Lodge of Int'l. Ass'n. of Machinists, 318 F.2d 504, 508 (9th Cir. 1963).

The Court below however, permitted the determination of genuine issues of material facts -- the truth or falsity of plaintiff's varied and widespread allegations against the defendants -- to be resolved by a motion to dismiss with its attached exhibits, an affidavit of defendants' counsel in support thereof, and by reviewing plaintiff's deposition.

In Giordani v. Hoffman, 277 F. Supp. 722, 725 (E.D. Penn. 1967), the Court, quoting with approval from Horner v. Ferron, supra at 229, held:

> "'Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are a fortiori, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pretrial, discovery as may be undertaken.'" See Sabolsky v. Budzanoski, supra at 1252.

It cannot be too strongly emphasized that it was plaintiff's genuine fear of reprisals, both physical and economical, from the defendants or their agents that caused him to be evasive and reluctant to reveal and name his sources of information at his deposition. Sadly, violence is nothing new to the NMU and has previously befallen rivals of union leadership. Plaintiff, in fact, was shot in the right arm in 1973 when he sought to press a court action to halt an NMU election because of alleged irregularities. The day before appearing for his second deposition he was beaten inside the NMU Hall; and his associates, members of his rank and file committee, have been threatened because of their support of him.

As noted in Philips v. Osborne, 403 F.2d 826, 828 (9th Cir. 1968):

> "The Act (the LMRDA) was a response to the report of the Select Committee on Improper Activities in the Labor Management Field, more popularly known as the McClellan Committee Report. This Committee uncovered widespread practices of misappropriation of union funds and illicit profits by union officers, as well as repeated instances of violence and racketeering. See Interim Report of the Select Committee on Improper Activities in the Labor Management Field, S. Rep. No. 1417, 85th Cong., 2d Sess. (1958)."

It is in this context that the Court must view plaintiff's responsiveness, or lack thereof, at his deposition. All these

facts and circumstances should be taken into consideration in determining whether "good cause" had been shown. See, Purcell v. Keane, 406 F.2d 1195, 1200 (3rd. Cir. 1969).

Additionally, it should be emphasized that defendants' motion to dismiss came after only their pretrial discovery had begun. They had taken plaintiff's deposition at two sessions, had served written interrogatories and had "interviewed" plaintiff's supporters. Pre-trial discovery, however, is not available to a plaintiff suing under Section 501(b), until after leave to file the complaint has been granted. Horner v. Ferron, supra at 229 n. 6. Plaintiff, not having access to the defendants' nor the NMU's files, nor the opportunity at the time of defendants' Rule 12(b) motion to begin his pre-trial discovery, should not be unfairly prejudiced thereby.

Of course, this is not to say that all allegations against union officers must be accepted at their face value. After all, the requirement of Section 501(b) that a plaintiff in such an action show "good cause" before being entitled to file the complaint is intended as a safeguard to the affected union against harassing and vexatious litigation brought without merit or good faith. But when the allegations of the verified application and complaint are sufficient on their face, the

Court must call for at least a hearing, on its own motion or that of the defendants, to look beyond the allegations in determining whether the plaintiff has made the "good cause" showing required. Here, however, where multiple and complex questions of fact are at issue defenses:

> "should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken." Horner v. Ferron, supra at 229.

In the instant matter, the Court below, without any hearing and prior to any pre-trial discovery by plaintiff, granted defendants' motion even though a "good cause" showing had clearly been made on the face of the verified application, plaintiff's affidavit with annexed exhibits and the complaint. Under the circumstances, this was error.

CONCLUSION

The judgment appealed from dismissing the complaint herein should be reversed.

Respectfully submitted,

MELVIN E. ROSENTHAL
Attorney for Plaintiff-Appellant

Dated: October 9, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDY DINKO, etc.,

Plaintiff-Appellant,

- against -

SHANNON J. WALL, Et al.,

Defendants-Appellees.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 10th *day of* October *1975 at* 1) 30 Broad Street, N.Y., N.Y.
2) 1 Chase Plaza, N.Y., N.Y.
3) 346 W. 17th St., N.Y?, N.Y. *upon*

deponent served the annexed BRIEF

1) Szold Brandwyn Myers & Altman
2) Wilkie Farr Gallagher
3) Stanley B. Gruber

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 10th
day of October *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977